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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )  
)  
Amendment of the Commission's Rules ) WT Docket No. 95-157  
Regarding a Plan for Sharing ) RM-8643  
the Costs of Microwave Relocation )

To: The Commission

**COMMENTS OF UTC ON**  
**PETITIONS FOR RECONSIDERATION/CLARIFICATION**

Pursuant to Section 1.429 of the Federal Communications Commission's (Commission) Rules, UTC, The Telecommunications Association (UTC), hereby responds to the *Petitions for Reconsideration/Clarification* filed by the American Petroleum Institute (API)<sup>1</sup> and the South Carolina Public Service Authority (Santee Cooper)<sup>2</sup> in response to the Commission's *Second Report and Order (SR&O)*, FCC 97-48, released February 27, 1997, in the above-referenced docket. UTC supports these *Petitions* and urges the Commission to clarify: (1) that incumbents are eligible for cost-sharing expenses incurred since April 5, 1995; (2) that the depreciation formula does not apply to self-relocating incumbents; (3) that incumbents are eligible for relocation costs associated with leased replacement facilities; and (4) the deadline for self-relocating incumbents to file with the cost-sharing clearinghouse.

<sup>1</sup> *Petition for Reconsideration and Clarification of the American Petroleum Institute (API Petition)*, filed April 16, 1997.

<sup>2</sup> *Petition for Reconsideration and Clarification (Santee Cooper Petition)*, filed April 17, 1997.

**I. UTC Agrees That Incumbents Should Be Eligible For Cost-Sharing Expenses Incurred Since April 5, 1995**

As UTC noted in its own *Petition*<sup>3</sup>, the Commission's rules permit PCS relocators to submit receipts or other documentation to the clearinghouse for relocation expenses incurred since April 5, 1995, the date that the voluntary relocation period began for the first PCS licensees.<sup>4</sup> However, these rules do not clearly establish whether incumbent relocators have this same right. In their *Petitions*, both API and Santee Cooper join UTC in urging the Commission to clarify that microwave incumbents are entitled to reimbursement for relocation expenses incurred since April 5, 1995.

API notes that this discriminatory treatment of self-relocating microwave incumbents "would be both illogical and unfair" and would punish those incumbents that "quickly and voluntarily cleared their spectrum to make way for PCS."<sup>5</sup> Santee Cooper adds that the Commission has offered no explanation as to why it would treating incumbents differently than PCS relocators, nor does any rational explanation exist for such discrimination.<sup>6</sup> Santee Cooper also notes that incumbent self-relocations that occurred prior to the adoption of the Commission's rules have benefited PCS licensees in a number of ways, including speeding the deployment of PCS and reducing overall relocation costs.<sup>7</sup> Equity therefore requires that PCS licensees reimburse incumbents for costs incurred since April 5, 1995.

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<sup>3</sup> *Petition for Reconsideration/Clarification (UTC Petition)*, filed April 17, 1997.

<sup>4</sup> 47 CFR § 24.245(b).

<sup>5</sup> *API Petition*, pp. 5-6.

<sup>6</sup> *Santee Cooper Petition*, p. 5.

<sup>7</sup> *Santee Cooper Petition*, pp. 6-8.

UTC also agrees with Santee Cooper that the argument for reimbursement of costs prior to the adoption of the Commission's most recent rule change is especially strong for those incumbents that self-relocated paths in conjunction with the relocation of other paths by a PCS licensee.<sup>8</sup> In such cases, incumbents that have been faced with the "no-win" situation of deciding whether to delay relocation until a whole-system replacement agreement can be reached among all PCS licensees or to subject their microwave system to an unacceptable level of risk. Those incumbents that choose to relocate their own paths to protect the integrity of their systems are particularly deserving of reimbursement for relocation costs.

Furthermore, as UTC pointed out in its own *Petition*, the Commission's rules already provide safeguards against unreasonable reimbursement requests (such as the limitations on the types of reimbursement expenses and the per-link amount of reimbursement, as well as requirements concerning the documentation of relocation costs). UTC noted that incumbents are even subject to an additional level of scrutiny that ensures that only reasonable relocation costs are reimbursed -- unlike PCS relocators, incumbent self-relocators must submit third-party appraisals of relocation expenses to the clearinghouse along with the cost data. There is therefore no need for additional restrictions that would serve only to allow PCS licensees to avoid paying an equitable portion of the relocation expenses.<sup>9</sup>

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<sup>8</sup> *Santee Cooper Petition*, p. 6.

<sup>9</sup> *UTC Petition*, p. 4.

## **II. UTC Agrees that the Depreciation Formula Should NOT Apply to Self-Relocating Incumbents**

UTC strongly supports the recommendations of API and Santee Cooper that the Commission not apply the depreciation formula to self-relocating incumbents. As these parties note, and as UTC stated in its own *Petition*, the application of the depreciation formula to self relocations is unwarranted.

Santee Cooper notes that the principle reason for the depreciation formula -- to offset the competitive benefit that an early entrant PCS licensee derives from being the first to the market -- is inapplicable to incumbent self-relocators.<sup>10</sup> In fact, the FCC did not even apply this formula to all PCS licensees. Under the rules adopted in the *First Report and Order (FR&O)*, PCS licensees which relocate microwave paths outside of their operating areas or frequencies are entitled to full reimbursement up to the reimbursement caps.<sup>11</sup> To treat self-relocating incumbents differently than PCS licensees that relocate non-interfering links is, according to Santee Cooper and API, an "inherent inconsistency"<sup>12</sup> and "unjustifiable."<sup>13</sup> UTC agrees.

UTC also agrees with both Santee Cooper's and API's conclusions that the Commission's stated reasons for applying the depreciation formula to incumbents do not survive scrutiny. For example, the first reason supplied by the Commission for applying the depreciation formula to incumbents was that microwave incumbents which self-relocate receive benefits they might not

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<sup>10</sup> *Santee Cooper Petition*, p. 6.

<sup>11</sup> *FR&O*, para. 74, Appendix A, paras. 16-17.

<sup>12</sup> *Santee Cooper Petition*, p. 12.

<sup>13</sup> *API Petition*, p. 11.

otherwise receive. As Santee Cooper states, while there "may" be some benefit to incumbents, "the entire relocation process is far more often a burden and unnecessary distraction from the incumbent's principal business or government activity."<sup>14</sup> The second justification offered by the Commission for applying the depreciation formula to incumbents -- that depreciation provides an incentive for microwave incumbents to minimize costs -- is refuted by Santee Cooper's observation that the Commission's cost-sharing rules already provide adequate incentives to minimize relocation costs.<sup>15</sup> UTC agrees with API that the Commission's failure to treat self-relocating incumbents and PCS relocators equally would serve only to "(1) deny incumbents their rightful recovery and; (2) strip away the incentive of incumbents to self-relocate, thereby defeating the very purpose of allowing them to participate in the cost-sharing plan."<sup>16</sup>

### **III. If The Depreciation Formula Is Applied To Incumbent Relocators, UTC Supports Clarification of the Formula's Application To Incumbents**

While UTC and the other Petitioners all agree that incumbent self-relocations should not be subject to the Commission's depreciation formula, UTC does join with API to request clarification of the depreciation formula in the event that the Commission does apply this formula to incumbents. In particular, UTC supports API's request for clarification of the "N" factor of the depreciation formula. This formula establishes that the amount of reimbursement is equal to  $C/N \times [120-T_m]/120$ , where C equals the actual relocation costs, N equals the number of PCS licensees that would have interfered with the link and  $T_m$  equals the number of months that have

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<sup>14</sup> *Santee Cooper Petition*, p. 10.

<sup>15</sup> *Santee Cooper Petition*, p. 11.

<sup>16</sup> *API Petition*, p. 11.

elapsed between the time that relocation rights were established and the month that the clearinghouse notifies a later-entrant of its reimbursement obligation.

UTC agrees with API that N -- the number of PCS licensees that would have interfered with the link at issue -- should not take into account a self-relocating incumbent. As API and UTC (in its own *Petition*) note, applying this formula such that N = 1 when the incumbent accomplishes its own relocation, and N = 2 when the first PCS licensee is determined to have interfered with the relocated link would limit the maximum reimbursement under the formula to one-half of the actual relocation costs.<sup>17</sup> Such a interpretation would deter (if not completely eliminate) incumbent participation in the cost-sharing mechanism.

#### **IV. UTC Supports API's Request for Clarification of Reimbursable Relocation Costs**

API notes in its *Petition* that the Commission's cost-sharing rules may be narrowly read to exclude some forms of "comparable facilities" from reimbursement under the cost-sharing mechanism.<sup>18</sup> In particular, API notes that, because the rules limit reimbursement to actual relocation costs, incumbents relocating to leased facilities may not be eligible for reimbursement.

API therefore urges the Commission to clarify that reimbursement is permitted for relocation to leased services. UTC agrees, and urges the Commission to clarify its rules to remove the suggestion that incumbents wishing to self-relocate and participate in cost-sharing are limited to microwave replacement facilities.

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<sup>17</sup> *API Petition*, pp. 11-12.

<sup>18</sup> *API Petition*, pp. 7-8.

As API points out, not permitting the reimbursement of leased facilities costs under the cost-sharing mechanism would frustrate one of the main goals of the cost-sharing rules -- to encourage the deployment of PCS. If leased facility replacement costs are not reimbursable, any incumbents that might be considering these, or other non-spectrum-dependent, replacement facilities would not likely self-relocate from the band. They are much more likely to wait until a PCS licensee contacts them regarding relocation, which may delay the deployment of PCS and increase the costs of deployment.

UTC recommends that, as long as the relocation costs are verifiable and fall within the established criteria concerning caps, transaction expenses etc., the Commission should not try to dictate specific terms regarding relocation facilities. Indeed, the Commission has consistently avoided establishing "hard and fast" rules regarding what constitutes comparable facilities.<sup>19</sup> Therefore, if leased or other facilities are appropriate relocation facilities in certain circumstances, costs associated with these facilities should be reimbursable under the cost-sharing mechanism.<sup>20</sup>

**V. UTC Agrees that the Commission Should Clarify the Deadline for Self-Relocating Incumbents to File with the Cost-Sharing Clearinghouse**

In its *Petition*, API notes that there is some confusion over the application of the Commission's deadline for the filing of information by self-relocating incumbents with a cost-

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<sup>19</sup> *Notice of Proposed Rulemaking*, 11 FCC Rcd at 1957, para. 72.

<sup>20</sup> UTC agrees with API that there are a number of ways to determine the amount of reimbursement for leased facilities, including calculating the net value of the incumbent's lease payments for a specified period of time. UTC would recommend not establishing a date certain (such as the sunset date), but a specified period of time (i.e., ten years) to protect incumbents that self-relocate later in the process.

sharing clearinghouse.<sup>21</sup> The Commission's rules require incumbents to file with a clearinghouse within ten (10) business days of the "date that relocation occurs."<sup>22</sup> UTC joins API in requesting clarification of this rule. UTC recommends that the Commission clarify that the "date that relocation occurs" for the purposes of determining when the ten-day filing window occurs be no earlier than the date on which the incumbent has completed planning and engineering a comparable replacement facility. This date would be the earliest date on which a relocation agreement with a PCS licensee could have been reached and, because PCS relocators are required to file within ten days of signing a relocation agreement, this clarification would place incumbents in the same position as PCS relocators.

### **Conclusion**

UTC supports the *Petitions for Reconsideration/Clarification* filed by API and Santee Cooper. Specifically, UTC agrees that: (1) incumbents should be eligible for cost-sharing expenses incurred since April 5, 1995; (2) the depreciation formula should not apply to self-relocating incumbents; (3) incumbents should be eligible for relocation costs associated with leased or other replacement facilities; and (4) the Commission should clarify the deadline for self-relocating incumbents to file with the cost-sharing clearinghouse.

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<sup>21</sup> *API Petition*, p. 5, n. 1.


<sup>22</sup> 47 CFR § 24.245(a).




**WHEREFORE, THE PREMISES CONSIDERED,** UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these comments.

Respectfully submitted,

**UTC**

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Dated: May 20, 1997

## **CERTIFICATE OF SERVICE**

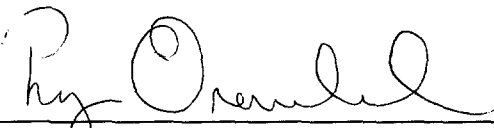
I, Ryan Oremland, hereby certify that I have caused to be sent, this 20th day of May, 1997, by first class mail, postage prepaid, copies of the foregoing to the following:

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